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SUPREME COURT, U.S.

No. 83-1254

In the Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD W. VELDE, ET AL., PETITIONERS

v.

NATIONAL BLACK POLICE ASSOCIATION, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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Respondents have failed to answer — for the most part, they have not even addressed — the reasons we advanced for this Court to review the court of appeals' decision. Respondents nowhere dispute that the court of appeals' approach, if it prevails, is likely to have a highly disruptive effect on the many important federal programs that involve the distribution of funds to agencies of state and local governments (see Pet. 11-12). In the Petition, we explained that the constitutional "duty" to terminate funding discerned by the court of appeals does not exist and cannot, by any stretch of the term, be viewed as "clearly established" within the meaning of *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982) (see Pet. 12-18); in response, respondents offer (Br. in Opp. 8-9) only a desultory argument consisting of two out-of-context quotations from decisions that, as we showed in the Petition, cannot possibly be read to establish such a clear duty. In the Petition, we said that we knew of no case

finding an implied statutory cause of action for damages against a federal official in his personal capacity; respondents do not identify any such case or even assert that one exists.[1] We urged (Pet. 19-20) that petitioners are entitled to absolute immunity because they were "agency officials performing * * * functions analogous to those of a prosecutor" (*Butz* v. *Economou*, 438 U.S. 478, 515 (1978)); respondents do not dispute this description of petitioners' functions. And respondents do not contest our submission that this case is on all fours with *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); indeed, they do not cite or discuss *Eastern Kentucky* at all.[2]

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[1]Respondents' apparent assertion that Congress "approved of" personal damages actions against LEAA officials (Br. in Opp. 16 & n.7) is quite incorrect. The House committee report cited by respondents refers only to "civil actions against the United States or [the] recipient government to remedy violations of the statutes" — not to damages actions against government officials in their personal capacity. H.R. Rep. 94-1155, 94th Cong., 2d Sess. 27 (1976).

[2]Although respondents attempt to create the impression that we did not raise below many of the questions presented in the Petition (see, *e.g.*, Br. in Opp. 4-5), they in fact assert only that we did not raise the question whether there is an implied cause of action for damages against individual government officials under the Crime Control Act (see Br. in Opp. 15). But the complaint itself does not explicitly rely on the Crime Control Act as a basis for seeking damages (see J.A. 44); respondents have revised their theory of this action as the litigation progressed. In view of the lack of clarity in the complaint, we believe the motion to dismiss fairly comprises the contention that there is no implied statutory cause of action (see J.A. 234-235). In any event, we explained in the Petition why the Court should decide this issue now (Pet. 22-23).

Notably, respondents, unlike the court of appeals, do not suggest that petitioners failed to raise below the question whether the complaint states a violation of the Constitution. As we said in the Petition, the court of appeals' statement is indisputably erroneous (see Pet. 12 n.10). Respondents do assert (Br. in Opp. 4-5) that the court of appeals did not decide this question; but the issue is clearly subsumed under the court of appeals' decision that respondents' allegations state a violation of clearly established constitutional rights.

We comment briefly on the two points that respondents do appear to emphasize, because these points further demonstrate that respondents' approach, and that of the court of appeals, is fundamentally inconsistent with *Harlow* and misunderstands the role of *Bivens* actions.

1. Respondents contend (*e.g.*, Br. in Opp. 1-2, 6, 7, 10 n.5) that the court of appeals was correct in ordering further proceedings because they alleged that petitioners' actions were "willful and malicious." This allegation occurs in a boilerplate passage in the ad damnum clause of the complaint. It is not connected to any specific action attributed to petitioners, and it is unsubstantiated by any specific assertions of fact. The central holding of *Harlow* is precisely that such "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery" (457 U.S. at 817-818).[3]

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[3]Respondents contend (Br. in Opp. 10) that petitioners are not entitled to qualified immunity because the Crime Control Act deprived them of all discretion to decide whether to terminate funding and they therefore, according to respondents, did not exercise "discretionary functions." This argument echoes that made by the appellees in *Davis* v. *Scherer*, No. 83-490 (argued Apr. 16, 1984), and we responded to it in our amicus curiae brief in that case. (A copy of this brief has been sent to respondents.) We explained in the Petition (at 20-22) why respondents' contention that the Crime Control Act denies petitioners all discretion is, in any event, implausible.

We note that respondents do not suggest that this case be remanded to the court of appeals for reconsideration in light of *Davis*, and in our view such an action would be pointless. The court of appeals has already determined that petitioners are not entitled to qualified immunity because they violated clearly established constitutional rights. Whatever the outcome of *Davis*, therefore, the court of appeals will order discovery and possibly a trial in the district court unless this Court overturns its decision.

2. Respondents also assert (*e.g.*, Br. in Opp. 2, 16) that members of Congress and the Civil Rights Commission criticized the civil rights enforcement policies of the LEAA.[4] But these are precisely the forums in which these policies should be examined; they should not be the subject of a *Bivens* action. The central error of the court of appeals' decisions in this case has been to allow respondents to pursue, for nine years, this $20 million personal damages action against former high government officials on the basis of a complaint that alleges, at bottom, only dissatisfaction with complex discretionary policy judgments made by officials in supervising the distribution of LEAA funds. Allowing *Bivens* actions to proceed under these circumstances risks distorting the decisions of the many government officials who supervise programs that involve the distribution of federal funds. We submit that the Court never intended *Bivens* actions to be used in this way, or to have this effect.

For these reasons and the reasons stated in the Petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

APRIL 1984

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[4]Respondents ignore the fact that these comments by Members of Congress, and the context in which they were made, contradict respondents' principal assertion about congressional intent. Respondents assert that, even before 1976, petitioners had no discretion to decide whether to terminate funding (see Br. in Opp. 11-13); but the debates over the 1976 amendments to the Crime Control Act, on which respondents rely, reveal that Congress believed LEAA officials had *too much* discretion during the time. See Pet. 22 n.16.

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